STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TRI-COUNTY ELECTRIC COOPERATIVE, INC.,	)	
Complainant,	)	
vs.	)	CASE NO. 05-0767
ILLINOIS POWER COMPANY, d/b/a AMEREN IP,	)	
Respondent.	)	

MOTION BY TRI-COUNTY ELECTRIC COOPERATIVE, INC. TO STRIKE THE AFFIDAVIT OR PORTIONS THEREOF OF MICHAEL TATLOCK FILED IN SUPPORT OF THE ILLINOIS POWER COMPANY d/b/a AMEREN IP MOTION FOR SUMMARY JUDGMENT

TRI-COUNTY ELECTRIC COOPERATIVE, INC., (Tri-County) by its attorneys, GROSBOLL, BECKER, TICE, TIPPEY & BARR, Jerry Tice of Counsel, herewith files its Motion to Strike the Affidavit or Portions Thereof as the case may be of the affidavit of Michael Tatlock, filed in support of the Illinois Power Company d/b/a Ameren IP (IP) Motion for Summary Judgment and in support thereof states as follows:

I. THE COMMISSION RULES PROVIDE THAT EVIDENCE PRESENTED TO THE COMMISSION IS SUBJECT TO THE RULES OF EVIDENCE AS APPLIED IN THE CIRCUIT COURTS OF THE STATE OF ILLINOIS

1. The Rules of the Commission, Section 200.610 require the Commission in any hearing to apply the Rules of Evidence as applied by the Circuit Courts of the State of Illinois with respect to evidence proffered in a hearing before the Commission. The only exception to this rule provides that evidence which is otherwise inadmissible in the courts of this state may be admitted by the agency if the evidence is of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

2. Affidavits filed in support of Motions for Summary Judgment must meet the requirements of Supreme Court Rule 191, which are:

A. The Affidavits shall be made upon the personal knowledge of the Affiant;

B. Shall not consist of conclusions but must submit only facts admissible in evidence;

C. Must have attached thereto, sworn or certified copies of all papers supporting statements made by the Affiant;

D. Must show affirmatively that the affiant, if sworn as a witness, could testify competently to the matters set forth in the Affidavit.

3. Michael Tatlock's Affidavit presents numerous opinions by the Affiant. With regard to opinion testimony, a witness may not testify on ultimate issues, Freeding-Skokie Roll-Off Service v. Hamilton 108 Ill. 2d 217; 483 N.E. 2d 524; 91 Ill. Dec. 178, 181 (1985); opinion testimony based on guess, surmise or conjecture is inadmissable, City of Evanston v. City of Chicago 279 Ill. App. 3d 255; 664 N.E. 2d 291; 215 Ill. Dec. 894, 904 (1996). For instance, an opinion that the lease was breached is not helpful, First National Bank of Evanston v. Sousanes 96 Ill. App. 3d 1047; 422 N.E. 2d 188; 52 Ill. Dec. 507, 512-513 (1981); a legal opinion that a person acted imprudently in his duties as co-trustee is not helpful, McCormick v. McCormick 180 Ill. App. 3d 184; 536 N.E. 2d 419; 129 Ill. Dec. 579, 592-593 (1988); an opinion that the insured was entitled to recover under the policy was improperly admitted, C.L. Maddox, Inc. v. Royal Insurance Co. of America 208 Ill. App. 3d 1042; 567 N.E. 2d 749; 153 Ill. Dec. 791, 798 (1991); expert testimony as to a person's legal duties under a construction contract improperly admitted, Coyne v. Robert H. Anderson and Assocs. 215 Ill. App. 3d 104; 574 N.E. 2d 863; 158 Ill. Dec. 750, 755 (1991); opinions expressed by either expert or lay witnesses in terms of the

legal criteria should be excluded, Mache v. Mache 218 Ill. App. 3d 1069; 578 N.E. 2d 1253; 161 Ill. Dec. 607, 612 (1991); an expert or lay witness cannot be asked to testify as to statutory interpretation, Magee v. Huppin-Fleck 279 Ill. App. 3d 81; 664 N.E. 2d 246; 215 Ill. Dec. 849, 852 (1996). Nor, can a witness offer an opinion as to how a question should be decided or offer a speculative opinion, Cleary and Graham's Handbook of Illinois Evidence Seventh Edition, Section 611.25, page 555.

Modern practice requires that prior to a witness testifying as to an opinion, the witness must first lay a foundation establishing personal knowledge of the facts that form the basis of the opinion. Simply stated, testimony is not admissible unless the witness has personal knowledge through his or her own senses, i.e., capacity, opportunity, actual acquisition and retention of the related matter People v. Enis 139 Ill. 2d 264; 564 N.E. 2d 1155; 151 Ill. Dec. 493, 502-503 (1990); Northern Illinois Gas Co. v. Vincent DiVito Construction 214 Ill. App. 3d 203; 573 N.E. 2d 243; 157 Ill. Dec. 825, 834 (1991). If the basis of the opinion includes so many varying or uncertain factors that the witness is required to guess or surmise in order to reach an opinion, the opinion is objectionable as speculation or conjecture City of Evanston v. City of Chicago 279 Ill. App. 3d 255; 664 N.E. 2d 291; 215 Ill. Dec. 894 (1996). Likewise, a foundation must be laid as to the witnesses' personal knowledge of the facts or event to which the witnesses compares the evidence at hand, that is a witness may not testify that something smelled like dynamite unless it is sufficiently established that the witness from prior experience knows what dynamite smells like.

4. IP presents substantial hearsay testimony through the Affidavit of Michael Tatlock. Hearsay evidence is defined as testimony in court or written evidence of a statement made out of

court, which statement is offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of an out-of-court declarant People v. Rogers 81 Ill. 2d 571; 411 N.E. 2d 223; 44 Ill. Dec. 254, 257 (1980). A statement that is hearsay is not admissible unless the statement satisfies an exception to the rule against hearsay recognized by the common law or by an exception provided by statute. The common illustration given between admissible testimony and that barred by the Hearsay Rule is the example of A testifying that B told him that event X occurred. If A's testimony is offered for the purpose of establishing that B said this, it is admissible. If on the other hand the testimony is offered to prove that the event X occurred, it is not admissible because the only probative test rests in B's knowledge and B is an out-of-court declarant. Likewise, documentary evidence and recorded statements of a witness may also be hearsay Douglas v. Chicago Transit Authority 3 Ill. App. 3d 318; 279 N.E. 2d 44, 46 (1972). Where the hearsay consists of only out-of-court oral declarations to prove a fact it is not admissible Saal v. County of Carroll 181 Ill. App. 3d 327; 536 N.E. 2d 1299; 130 Ill. Dec. 88, 95 (2nd Dist. 1989). Likewise, where the hearsay evidence consists of records otherwise admissible as an exception to the hearsay rule, the Supreme Court of Illinois still requires the Administrative Agency hearing the matter to exclude the hearsay records unless sufficient foundation as to the accuracy of the records is introduced in evidence Grand Liquor Co. v. Department of Revenue 67 Ill. 2d 195; 367 N.E. 2d 1238; 10 Ill. Dec. 472, 476 (1977); Eastman v. Department of Public Aid 178 Ill. App. 3d 993; 534 N.E. 2d 458; 128 Ill. Dec. 276, 278, 280 (2nd Dist. 1989).

5. The Affidavit of Michael Tatlock relied upon by IP in support of its Motion for Summary Judgment does not meet the foregoing requirements of Supreme Court Rule 191 and Section 200.610 of the Commission Rules for one or more of the following reasons:

A. Affiant asserts numerous conclusions and opinions on matters which are part of the ultimate issue in this case to be decided by the trier of fact (The Commission), to wit: conclusions by the Affiant that the electric service connection point for the Citation Oil & Gas Corporation (Citation Oil) gas plant and the gas compressor sites or "point of delivery" as defined by the March 18, 1968 Service Area Agreement between Tri-County and Illinois Power is the Illinois Power Texas substation.

B. Affiant asserts conclusions or opinions with respect to the purpose of the Illinois Power Texas substation without providing supporting documentation.

C. Affiant profers statements as to the history of the Citation Oil Salem Unit of which Affiant does not have personal knowledge and does not provide documentation to support the Affiant's statements and therefor such assertions constitute hearsay evidence by the Affiant.

D. Affiant profers statements which are attributable to representatives of Citation Oil, to-wit: Ed Pearson and Jeff Lewis, who are not present, are not parties to the proceedings, have not provided Affidavits as to their statements, have not been called upon to testify in this matter, and which statements are not supported by any documentation attached to Affiant's Affidavit. Accordingly, Affiant's statements as to the comments and/or statements by Ed Pearson and Jeff Lewis constitute hearsay and are otherwise inadmissable when offered as to the truth of those statements.

E. Affiant profers statements as to the history of the Illinois Power Texas substation for periods of time prior to employment of Affiant by Illinois Power and therefore such statements are not based upon Affiant's personal knowledge, but knowledge gathered by Affiant from some other source and therefore constitute hearsay. To the extent Affiant has gathered such

information regarding the history and purpose of the Illinois Powers Texas substation from sources outside Affiant's personal knowledge, the source of such information is not identified by Affiant in the Affidavit and no documentation has been attached by Affiant to his Affidavit to provide a basis for the statements made by Affiant. Accordingly such statements constitute conclusions and/or hearsay and are not admissible.

II. THE FOLLOWING STATEMENTS IN THE MICHAEL TATLOCK AFFIDAVIT ARE INADMISSIBLE

1. The particular parts of the Affidavit of Michael Tatlock which do not conform with Supreme Court Rule 191 and the Rules of Evidence applied in Administrative Hearings are as follows:

A. At paragraph 5 of the Affidavit, Affiant states:

> "... around October 1952 AmerenIP completed construction of the Texas Substation located in Salem Township, 2N-Range 2E, Section 32, NW 1/4."

Such statement is purported to be based upon the Texas substation records maintained by AmerenIP without identifying those records showing the date of construction of the Texas substation, and therefore constitutes hearsay and is not admissible and should be stricken.

B. At paragraph 6, Affiant states:

> "AmerenIP records kept and maintained in the ordinary course of business indicate Ameren IP constructed the Texas Substation to provide electrical energy to Texaco Inc., pursuant to a contract dated April 6, 1955 ("Electrical Service Agreement")."

Such statement is not admissible for the following reasons:

(1) The statement as to the purpose for construction of the Texas substation is a conclusion by Affiant and is based upon records maintained by Illinois Power of the Texas substation without identifying such records or producing copies of such records that show the purpose for the construction of the Texas substation.

(2) The statement is hearsay since the Affiant has no personal knowledge as to the purpose for the construction of the Texas substation and such statement contradicts claims by Illinois Power that electric service is provided from the Texas substation to other customers.

C. At paragraph 7, Affiant states:

"AmerenIP records kept and maintained in the ordinary course of business indicate in or around October 30, 1952 AmerenIP connected the Texas Substation to its transmission system by means of a 69 kV transmission line (identified as line #6641)."

The foregoing statement should be stricken for the following reasons:

(1) Affiant's statement is based upon Illinois Power records which have not been attached to Affiant's Affidavit.

(2) Affiant's statement as to the date and time the Texas substation was connected to 1969 kV Transmission line is hearsay, since such fact is not within the personal knowledge of Affiant.

D. At paragraph 9, Affiant states:

"The point of delivery at which AmerenIP supplied electrical energy to Texaco Inc. and Citation Oil is the Texas Substation."

Such statements should be stricken because:

(1) Affiant fails to state the date he commenced employment with Illinois power but since Affiant did not receive his engineering degree until 1985 he would not have been employed by Illinois Power in any capacity prior to that time and therefore Affiant can not state that he had personal knowledge that the Texas substation has always been the "point of delivery" for Texaco Inc./Citation Oil.

(2) Such statement is a conclusion since it is not based upon the personal knowledge of Affiant.

(3) Such statement is a conclusion or opinion by Affiant as to the ultimate issue regarding the "point of delivery" as defined by the service area agreement for the gas plant and compressor sites, which conclusion is reserved to the Commission only.

E. At paragraph 10, Affiant states:

"...Texaco Inc., not AmerenIP, developed constructed and installed and had built its own distribution system to serve its facilities known as the Salem Unit.... Texaco, Inc., owned four separate primary 12.47 kV distribution circuits to serve the Salem Unit,..."

Such statement is not admissible because:

(1) The statement is not made upon Affiants personal knowledge and is information acquired by Affiant from other sources or other people and therefore is hearsay.

(2i) Such statement constitutes a conclusion or opinion by Affiant as to who constructed the distribution system for the Salem Unit, and the purpose, size, and description of the distribution system.

F. At paragraph 14, Affiant states:

"The Texas Substation is the location of the point of delivery and electrical service connection point between AmerenIP and Texaco, Inc. The point of delivery at which Texaco, Inc., received electrical energy from AmerenIP was energized on and for several years prior to July 3, 1968."

Such statement is not admissible because:

(1) Affiant's statement that the Texas substation is the "point of delivery and electrical service connection point" between IP and Texaco is a conclusion as to the ultimate issue in this case to be decided by the Commission which issue is what is the "point of delivery" for the gas plant and compressor sites.

(2) Affiant's statement characterizing of the Texas substation as a "point of delivery" is not based upon any factual statement and therefore constitutes an opinion by the Affiant upon the ultimate issue in this case.

(3) Affiant's statement that the Texas substation has been the "point of delivery" for Texaco Inc., since prior to July 3, 1968, is not based upon Affiant's personal knowledge and therefore is hearsay. Affiant has failed to attach any documents evidencing the date for energizing the Texas substation service connection point with Texaco, Inc.

G. At paragraph 15, Affiant states:

"Citation Oil was the successor in interest to Texaco Inc.'s rights under the existing Electrical Service Agreement with AmerenIP."

Such statement is not admissible because:

(1) Affiant fails to provide any foundation for Affiant's personal knowledge of such matters and therefore such statement is hearsay;

(2) Affiant fails to attach any documentation supporting the conclusion made by Affiant in such statement.

H. At paragraph 17, Affiant states that after:

"....discussion, including a meeting I attended with representatives from TCEC and Ed Pearson and Jeff Lewis with Citation Oil, Citation Oil decided not to apply for a new point of delivery or electric service connection." for the gas plant.

Such statement is not admissible because:

(1) Such statement as to Citation Oil's corporate decision regarding the new point of delivery or electric service connection is not based upon any personal knowledge of Affiant and therefore is hearsay.

(2) Such statement, to the extent it is based upon out of court statements by Ed Pearson and Jeff Lewis offered as to the truth of the matter, constitutes a hearsay statement by Affiant.

(3) Affiant fails to attach any documentation to support the conclusion rendered by Affiant of the corporate decision by Citation Oil regarding the gas plant electric service connection.

I. At paragraph 18, Affiant states:

"Citation Oil ultimately decided to extend its own distribution system to provide electrical energy to the gas plant."

Such statement is inadmissable because:

(1) Affiant fails to set forth any facts evidencing Affiant's personal knowledge of the corporate decision by Citation Oil regarding extension of its distribution system to provide electric energy to the gas plant. Therefore, such statement is hearsay.

(2) Affiant fails to attach any documentation to support Affiants assertion that Citation Oil decided to extend its own distribution system to provide electric energy to the gas plant and therefore such statement is hearsay by Affiant.

J. At paragraph 19, Affiant states:

"The gas plant does not constitute a customer separate and apart from the existing Citation electric load."

This statement is not admissible because:

(1) Affiant attempts to render an opinion that the service connection point to the Citation Oil gas plant does not create a "new customer" as is defined by Section 1(c) of the March 18, 1968 Service Area Agreement and therefore does not establish a new "point of delivery". Such an opinion by Affiant is not admissible as being an opinion on the ultimate issue in this case.

(2) Affiant's statement that the gas plant does not constitute a "separate customer" is not based upon any facts stated by Affiant and therefore constitutes a conclusion which is otherwise inadmissable.

(3) Whether the Citation Oil gas plant electric service connection point constitutes a separate customer or is the same customer is not relevant to the determination whether the electric service connection point to the gas plant causes Citation to become a "new customer" such that the new electric service connection point becomes a "new point of delivery" in Tri-County's service territory because service rights under the service area agreement are not conditioned upon each electric service connection point being owned by a separate customer.

K. At paragraph 20, Affiant states:

"At all times relevant, from at least 1955 to the present day, the point of delivery at which AmerenIP supplied electrical energy to Texaco Inc., and Citation Oil has remained the same."

This statement is inadmissable because:

(1) Such statement is not shown to be within Affiant's personal knowledge and is not supported by documents evidencing the date the "point of delivery" was established and therefore has not been properly supported and is hearsay.

(2) Such statement constitutes a conclusion by Affiant as to whether the Texas substation constitutes the only "point of deliver" for electric service by IP to Citation Oil.

(3) Such statements constitute an opinion rendered by Affiant as to the nature of the electric service connection point created by Citation Oil for the gas plant and the

gas compressor sites which is the ultimate issue in this case and therefore it is improper for Affiant to render an opinion thereon.

L. At paragraph 22, Affiant states:

"At all times relevant, from 1952 to the present day, neither Texaco Inc., nor Citation Oil has applied to AmerenIP for electric service at a point of delivery which was idle or not energized on July 3, 1968."

Such statement is inadmissable because:

(1) Such statement is not based upon Affiant's personal knowledge and therefor hearsay because it is based upon a time period during which Affiant was never employed by IP and therefore did not have personal knowledge as to the events occurring from 1952 until at least 1985.

(2) Said statement constitutes an opinion and/or conclusion by Affiant not based upon any facts set forth in Affiant's Affidavit with regard to whether the new electric service connection point created by Citation Oil for the gas plant and gas compressor cites constitute a "new point of delivery" as defined by the March 18, 1968 Service Area Agreement. Therefore such statement is inadmissable.

M. At paragraph 23, Affiant states:

"At all times relevant, from 1952 to the present day, no modifications ,i.e. adding a phase or phases of electric current, have been made to the electric service connection between AmerenIP and Texaco Inc./Citation Oil."

Such statement is inadmissable because:

(1) Such statement is based upon matters not within the personal knowledge of Affiant and for which Affiant does not provide any supporting documentation and therefore is hearsay.

(2) Such statement constitutes a conclusion by Affiant without any supporting documentation or recitation of the factual basis for such conclusion and therefore the same is inadmissable.

(3) Such statement constitutes a conclusion as to what constitutes "modifications" as utilized in Section 1 of the March 18, 1968 Electric Service Agreement and therefore inadmissable.

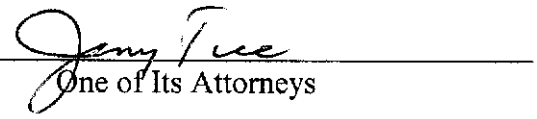
2. The foregoing statements contained in each of the numbered paragraphs should be

stricken for the foregoing reasons.

WHEREFORE, Tri-County Electric Cooperative, Inc., requests the Illinois Commerce Commission to strike the foregoing paragraphs from the Affidavit of Michael Tatlock in support of the Illinois Power Company d/b/a AmerenIP Motion for Summary Judgment as being inadmissable and for such other and further relief as the Illinois Commerce Commission deems just and equitable.

TRI-COUNTY ELECTRIC COOPERATIVE, INC.,

BY GROSBOLL, BECKER, TICE, TIPPEY & BARR

BY 
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PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 6 day of June, 2008, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the attached Motion by Tri-County Electric Cooperative, Inc. to Strike the Affidavit or Portions Thereof of Michael Tatlock Filed in Support of the Illinois Power Company d/b/a AmerenIP Motion For Summary Judgment addressed to the following persons at the addresses set opposite their names:

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